90-838

No. _____

In The

Supreme Court of the United States

October Term, 1990

SHIRLEY M. MOLZOF, as personal representative of the Estate of ROBERT E. MOLZOF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How should the term "punitive damages," as used in 28 U.S.C. §2674, Federal Tort Claims Act, be defined?

2. Is a veteran, who is entitled to receive free medical care from the Veterans' Administration pursuant to 38 U.S.C. §610, entitled to recover damages for future medical expenses in an action under the Federal Tort Claims Act arising from the medical negligence of Veterans' Administration employees?

LIST OF PARTIES

The parties to these proceedings are petitioner Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, and respondent United States of America.

The claim of Robert E. Molzof, which is the subject of these proceedings, was originally brought by his guardian ad litem, Thomas H. Geyer. After the entry of final judgment in the United States District Court for the Western District of Wisconsin, but before the filing of the Notice of Appeal in the United States Court of Appeals for the Seventh Circuit, Robert E. Molzof died. Accordingly, Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, was substituted as plaintiff-appellant in the appellate court.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin has not been reported. The oral Findings of Fact and Conclusions of Law of that court are reprinted in the appendix to this petition at pages App. 10-App. 24. The Memorandum and Order of that court is reprinted in the appendix, at pages App. 26-App. 29.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Molzof v. United States*, 911 F.2d 18 (7th Cir. 1990). The opinion is also reprinted in the appendix, at pages App. 1-App. 9.

JURISDICTION

This case involves the review of a judgment of the United States Court of Appeals for the Seventh Circuit entered on August 30, 1990.

This Court has jurisdiction to review judgments of the courts of appeal by writ of certiorari, as provided in 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1346(b), United States as defendant

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,

under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674, Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

38 U.S.C. §351, Benefits for persons disabled by treatment or vocational rehabilitation

Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Veterans' Administration, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

38 U.S.C. §610, Eligibility for hospital, nursing home, and domiciliary care.

Included in the appendix.

STATEMENT OF THE CASE

I. Nature Of The Case.

This is an action under the Federal Tort Claims Act seeking recovery of damages for personal injuries sustained by Robert E. Molzof on November 2, 1986, as a result of medical negligence on the part of employees of a Veterans' Administration hospital where Mr. Molzof was a patient.

II. Statement Of Facts, Procedural History Of The Case, And Disposition In The Courts Below.

On October 31, 1986, Robert E. Molzof underwent surgery to remove a lobe of his lung at the William S. Middleton Memorial Veteran's Hospital in Madison, Wisconsin. As part of his post-operative care, he was temporarily placed on a ventilator. On November 2, 1986, employees of the hospital disconnected the alarm system on his ventilator and while the alarm was disconnected, a tube providing oxygen to Mr. Molzof became disconnected. The tube disconnection was discovered eight minutes later, at which time, Mr. Molzof's heart rate was between 30 and 40 beats per minute. By the time a physician arrived, Mr. Molzof was in complete cardiac arrest. He was not resuscitated until almost a half hour later. As a result of this episode, Mr. Molzof suffered anoxic encephalopathy. (R. 38:2) In other words, he suffered irreversible brain damage due to oxygen deprivation.

As a result of the anoxic encephalopathy, Mr. Molzof was in a permanent vegetative state. He required a ventilator for assistance in breathing and a nasogastric tube for nutrition and hydration. (R. 38:4) He was in need of hospitalization for the balance of his life, and resided at

the Veterans' Administration Hospital in Tomah, Wisconsin at the time of trial. (R. 38:3-4)

On September 29, 1988, Robert E. Molzof and his wife, Shirley M. Molzof, commenced this action against the United States of America seeking recovery of the damages they had sustained as a result of the hospital employees' negligence. The action was commenced in the United States District Court for the Western District of Wisconsin, and jurisdiction in that court was based upon 28 U.S.C. §1346(b) and on Chapter 171 of Title 28 of the United States Code.

The United States admitted that the hospital employees were negligent and that such negligence caused brain damage to Mr. Molzof. (R. 5:1; 38:2-3) Since the United States admitted liability, only the issue of damages was tried before the court, Judge John C. Shabaz, presiding. (R. 74; 75; 76) The court subsequently made oral findings of fact and conclusions of law, including the following:

FINDINGS OF FACT

1. Based on a consideration of the testimony of three expert witnesses and a summary of Mr. Molzof's medical records, the court determined that Mr. Molzof had a life expectancy of three years at the time of trial. (R. 76:329-30; App. 11)

2. The care received by Mr. Molzof at the Veterans' Administration Hospital in Tomah, Wisconsin was reasonable, necessary and adequate. (R. 76:330-31; App. 11-App. 12)

3. Shirley Molzof was satisfied with the services provided to her husband, except that she was concerned with the lack of communication between her and the

medical profession, the failure to provide physical therapy to her husband, and with the fact that visits by physicians occurred once per month, rather than more often. (R. 76:331; App. 12)

4. Mrs. Molzof had not shown to the satisfaction of the court that additional places of care, other than the Veterans' Administration Hospital in Tomah, were available. Although care at one hospital in Madison, Wisconsin may have been available, Mrs. Molzof had not demonstrated that the care provided there would have been the same or similar to that provided at the Veterans' Administration Hospital. (R. 76:331-32; App. 13)

5. The medical testimony most favorable to the Molzofs suggested that Mr. Molzof not be transferred to another hospital. (R. 76:332; App. 13)

6. Mrs. Molzof had no intention at the time of trial to transfer her husband to another institution. (R. 76:332; App. 13-App. 14)

7. At the Veterans' Administration Hospital in Tomah, there was a physical therapy staffing shortage, a lack of sufficient respiratory therapists, and a lack of weekly visits by the doctor. (R. 76:332; App. 13)

8. The costs of providing similar treatment to Mr. Molzof at a private institution were the following: the per diem rate was $915 per day, annualized at $333,975; respiratory therapy at a rate of $50 per visit, three visits per day, annualized at $54,750; physical therapy at a rate of $50 per visit, one visit per week, annualized at $2,600; occupational therapy at a rate of $50 per visit, one visit per month, annualized at $600; the stipulated cost of disposable equipment was $37,388.88 per year; the stipulated cost of medication was $12,229.13; and the stipulated cost of medical attention was $2,340 per year. (R. 76:332-33; App. 14)

CONCLUSIONS OF LAW

1. Because Mr. Molzof was entitled to free medical care from the Veterans' Administration for the remainder of his life, he was not entitled to recover damages for future medical care, except for the care which was not being provided at the Veterans' Administration Hospital in Tomah. (R. 76:334-36; App. 15-App. 16)

2. It was not in the best interest of Mr. Molzof to move him from the Veterans' Administration facility to other hospitals, and Mrs. Molzof had no intention to have Mr. Molzof moved to another facility. (R. 76:336; App. 16-App. 17)

3. The care provided at the Veterans' Administration Hospital was adequate, reasonable and necessary. Mr. Molzof was entitled to continue to receive adequate, necessary and reasonable hospitalization at the level which he was receiving at the time of trial, and such hospitalization should continue throughout the rest of his life. The court concluded that in addition to the care which Mr. Molzof was receiving at the time of trial, he should receive physical therapy of one visit per week, at $50 per visit, annualized at $2,600; he should receive additional respiratory therapy of one visit per day, at $50 per visit, annualized at $18,250; and he should receive additional medical attention in the form of physician visits, in the amount of $1,800 per year. The court concluded that such medical care was to be provided for the three-year remaining life expectancy of Mr. Molzof. (R. 76:336-37; App. 17-App. 18)

4. The court concluded that an award greater than that provided by the court for future medical needs would be a double recovery, and would also be punitive in nature to the United States, since the government would be providing medical care through the balance of

Mr. Molzof's life, but would nonetheless be required to pay damages for Mr. Molzof's future medical needs, which would not be used for that purpose. (R. 76:337-38; App. 18)

5. Mr. Molzof was not entitled to recover damages for loss of enjoyment of life. Any damages for loss of enjoyment of life would not have been compensatory to him, since he was comatose. Since such damages were not compensatory, they were punitive in nature and could not be awarded under the Federal Tort Claims Act. (R. 76:338-40; App. 18-App. 21)

On July 12, 1989, Judge Shabaz issued a Memorandum and Order (R. 68; App. 26-App. 29), which was subsequently amended by a corrected memorandum issued on August 15, 1989. (R. 77; App. 32-App. 33) In its memorandum, the court essentially reiterated its conclusions of law. The court determined that Mr. Molzof was entitled to future reasonable, necessary and adequate care, to include full hospitalization for the remainder of his life at a Veterans' Administration hospital, together with $7,800 for physical therapy, $54,750 for respiratory therapy, and $5,400 for weekly physician's visits, for a total of $67,950. (R. 77; App. 32) The court also determined that an adequate award for loss of enjoyment of life, if such an award were permissible under the law, would be $60,000. (R. 68:3; App. 28)

On July 12, 1989, judgment was entered in favor of Mr. Molzof against the United States in the amount of $67,950, and the government was ordered to provide Mr. Molzof with reasonable, adequate and necessary care, to include hospitalization for the remainder of his life at a Veterans' Administration facility. (R. 69; App. 30-App. 31)

Robert Molzof appealed from that portion of the judgment entered on July 12, 1989 in which he was

denied an award for future medical expenses and denied an award for loss of enjoyment of life.

On August 30, 1990, the United States Court of Appeals for the Seventh Circuit issued its decision. (App. 1-App. 9) The appellate court held that Mr. Molzof was not entitled to recover damages for future medical care in an amount in excess of the $67,950 (erroneously stated by the appellate court to be $75,750) awarded by the district court. The appellate court reasoned that since Mr. Molzof was entitled to receive free medical care from the Veterans' Administration and since there was no evidence indicating that he was not going to receive such free care, any greater award for future medical expenses would be duplicative and punitive and hence barred by the Federal Tort Claims Act prohibition of "punitive damages." The court also held that Mr. Molzof was not entitled to recover damages for loss of enjoyment of life since Mr. Molzof, being comatose, would not be able to benefit from the money. Such damages would, therefore, not be compensatory, but would be punitive in nature and were thus barred by the Act. Accordingly, the appellate court affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

The appellate court's refusal to allow Mr. Molzof to recover any amount more than $67,950 for future medical expenses and its refusal to allow him to recover damages for loss of enjoyment of life were based on the court's determination that such damages would be punitive in nature and would violate the prohibition in 28 U.S.C. §2674 against "punitive damages." The definition of "punitive damages" on which the court relied, although utilized by some courts of appeal, is not followed by other courts of appeal. Moreover, the decision of the

appellate court disallowing full recovery for future medical expenses is in conflict with the decisions of the courts of appeal which have addressed the issue of whether a veteran, who is entitled to receive free medical care from the government, is also entitled to be compensated for future medical expenses in an action brought under the Federal Tort Claims Act.

I. THERE IS A CONFLICT IN THE COURTS OF APPEAL CONCERNING THE DEFINITION OF "PUNITIVE DAMAGES" FOR PURPOSES OF THE FEDERAL TORT CLAIMS ACT, AND REVIEW BY THIS COURT WILL RESOLVE THE CONFLICT.

In an action brought under the Federal Tort Claims Act, the components and measure of damages are controlled by the law of the state where the tort occurred. *Richards v. United States*, 369 U.S. 1, 6-10 (1962); 28 U.S.C. §1346(b). The Federal Tort Claims Act provides, however, that the United States "shall not be liable . . . for punitive damages." 28 U.S.C. §2674. The Act does not specify whether federal standards or state standards should be used in determining which damages are punitive in nature and which are compensatory.

Faced with arguments by the government that certain elements of damages awarded pursuant to state law in Federal Tort Claims actions were punitive in nature, several courts of appeal have been required to decide whether state law damage elements are punitive or compensatory. The courts of appeal have concluded that federal law is controlling on this issue, and they have adopted a federal law definition of "punitive damages." The courts, however, have not adopted the same definition. Courts in the First, Fourth, Fifth and Ninth Circuits have defined "punitive damages" to mean any damages in excess of the amount necessary to compensate the

claimant. *D'Ambra v. United States*, 481 F.2d 14 (1st Cir. 1973), cert. denied, 414 U.S. 1075 (1973); *Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Hartz v. United States*, 415 F.2d 259 (5th Cir. 1969); *Felder v. United States*, 543 F.2d 657 (9th Cir. 1976). Other courts of appeal have defined "punitive damages" to mean those damages which are based on the culpability of the tortfeasor's conduct and which are meant to punish the tortfeasor. This definition has been adopted by courts in the Second, Sixth and Eighth Circuits. *Rufino v. United States*, 829 F.2d 354 (2nd Cir. 1987); *Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978); *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987). This definition has also found support in the Ninth Circuit as well. *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984); *Yako v. United States*, 891 F.2d 738 (9th Cir. 1989).

Believing it to represent the "majority" view, the Court of Appeals for the Seventh Circuit in this case adopted the view that "punitive damages" for purposes of the Federal Tort Claims Act are those which exceed the amount necessary to compensate the claimant. The court stated:

> Since it is well settled that the purpose of the Act is compensation, the majority of circuits define "punitive damages" under the Act as any damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort. . . . Whether or not an award carries with it the deterrent and punishing attributes typically associated with the word "punitive", to the extent that an award gives more than the actual loss suffered by the claimant it is punitive and nonrecoverable.

Molzof v. United States, 911 F.2d at 20-21, citing *Flannery v. United States*, 718 F.2d at 111.

Relying on this definition of "punitive damages," the appellate court held that Mr. Molzof was not entitled to recover damages for future medical expenses in excess of the amount awarded by the district court, or to recover damages for loss of enjoyment of life, because such damages would not result in compensating Mr. Molzof and were, therefore, punitive.

A. Four Circuits Have Characterized "Punitive Damages" As Those In Excess Of The Amount Necessary To Compensate The Claimant.

Flannery v. United States, 718 F.2d 108, on whose definition of "punitive damages" the appellate court in this case relied, is the leading case which espouses the view that "punitive damages," for purposes of the Federal Tort Claims Act, are those damages which are in excess of the amount necessary to compensate the claimant. In that case, a father brought suit against the government on behalf of his permanently comatose son who was injured in an automobile accident caused by the negligence of a federal employee. The son was awarded damages under West Virginia law for past and future medical expenses, impairment of his future earning capacity, and the loss of his ability to enjoy life. The government appealed, claiming that the award was partly punitive. In a two-to-one decision, the Court of Appeals for the Fourth Circuit held that in a Federal Tort Claims action, a federal court must decide whether damage elements are compensatory or punitive, without regard to their characterization under state law:

> Under 28 U.S.C. §2674 of the Tort Claims Act, damages generally are determinable under state law, for the United States is to be held liable "to the same extent as a private individual

> under like circumstances." But there is a qualification, the relevance and importance of which is now clearly apparent. Punitive damages are not allowable. The Federal Tort Claims Act is a waiver of immunity from suit of the United States, and conditions attached to the waiver must be strictly enforced. The government's immunity is waived insofar as compensatory damages may be determined and awarded. The door for the assertion of private tort claims in federal courts is opened that far, but then the question arises about the allowability of damages treated and labeled under state law as "compensatory" which are in excess of those necessary to provide compensation for injuries and losses actually sustained.
>
> The question of the allowance of such damages is one of federal law. What is compensatory and what is punitive, within the meaning of the statute, is related directly to the extent of the waiver of sovereign immunity. How widely the Congress intended to open the door is not a matter to be resolved under the widely varying laws of the fifty states, but under a uniform standard.

718 F.2d at 110.

The court went on to hold that damages are punitive if they exceed the actual loss sustained by the claimant:

> The FTCA's proscription of awards of punitive damages authorizes only those awards that compensate or reimburse, or provide recompense or redress for injuries suffered by the claimant. To the extent that an award gives more than the actual loss suffered by the claimant, it is "punitive" whether or not it carries with it the deterrent and punishing attributes typically associated with the word "punitive."

718 F.2d at 111.

Applying that test, the *Flannery* court disallowed as punitive the award of damages for loss of enjoyment of

life. The court concluded that the award would not compensate the comatose plaintiff because he could not enjoy the money. The court also held that because earnings are usually taxed, income taxes had to be deducted from the award for loss of future earnings in order to avoid an award of punitive damages. The court also concluded that the award for loss of future earnings had to be reduced by the amount of the award for future medical expenses. The court reasoned that awards to the plaintiff for both future lost earnings and future medical expenses would require the government to pay twice for the plaintiff's living expenses and would, therefore, be punitive.

The *Flannery* court's definition of punitive damages was consistent with that utilized earlier in other courts of appeal. In *Hartz v. United States*, 415 F.2d 259, a woman brought an action for the wrongful death of her husband under a Georgia wrongful death statute which permitted the survivor to recover "the full value of the life of the decedent." The Fifth Circuit held that in awarding damages to the widow for the value of her husband's life, the district court was required to deduct the amount of personal expenses the decedent would have incurred and the taxes he would have paid on his earnings had he lived. The appellate court reasoned that if such an amount were included in the award, the award would be punitive because the widow would not have received that money if the decedent had lived. The appellate court concluded that in a wrongful death action under the Federal Tort Claims Act, a federal court could not award an amount in excess of the loss sustained by the survivor.

In *D'Ambra v. United States*, 481 F.2d 14, the parents of a four-year old boy brought an action for his wrongful death under a Rhode Island statute which provided for recovery by the parents of an amount computed in terms of the economic loss to the decedent's estate. Since that

amount did not bear any relation to the actual loss suffered by the parents, the First Circuit held that a damage award under the statute was punitive and impermissible under the Federal Tort Claims Act.

In *Felder v. United States*, 543 F.2d 657, claims were brought for the wrongful deaths of three people killed in an airplane crash. In awarding damages, the district court deducted from the award an amount equal to the federal and state income taxes the decedents would have had to pay on their future earnings. The Ninth Circuit upheld the deduction, stating:

> To award the full incomes to the survivors without deducting these taxes would be to award them monetary compensation that they could not logically or reasonably have expected to receive had decedents lived.
>
> Since failure to deduct income taxes would result in plaintiffs receiving greater financial support than they would have in the normal course of events, we would consider the effect of such an award to be punitive.

543 F.2d at 669-70.

B. Four Circuits Have Defined "Punitive Damages" In Accordance With Traditional Tort Principles To Mean Those Damages Which Are Intended To Have A Deterrent And Punishing Effect, And One Additional Circuit Has Rejected *Flannery*.

The principle of *Flannery* that "punitive damages" are those which exceed the amount necessary to compensate the claimant, regardless of whether those damages have the deterrent effect normally associated with punitive damages, has been rejected by an increasing number of courts of appeal.

In *Kalavity v. United States*, 584 F.2d 809, an action was brought under Ohio law for the death of a man killed

as a result of the negligence of a government employee. The Sixth Circuit held that the award of damages to the widow could not be reduced on the ground that she had remarried and received support from her new husband. The court found "farfetched" the government's argument that the award did not compensate the plaintiff for an actual loss. 584 F.2d at 811. The court stated that damages are "punitive" only when "awarded separately for the sole purpose of punishing a tortfeasor who inflicted injuries 'maliciously or wantonly, and with circumstances of contumely or indignity.' " 584 F.2d at 811, n. 1, quoting *Milwaukee R.R. v. Arms*, 91 U.S. 489, 493 (1875). The *Kalavity* court reasoned that in enacting the Federal Tort Claims Act, Congress intended to follow traditional tort law concepts when it forbade an award of punitive damages. The court held that the Act's prohibition of punitive damages was only designed to prohibit "use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together." 584 F.2d at 811.

Because of its decision in *Felder v. United States*, 543 F.2d 657, which upheld a deduction of income taxes from an award for loss of future earnings, the Ninth Circuit is generally counted among those circuits which view "punitive damages" as any damages in excess of the amount necessary to compensate the claimant. Even the Seventh Circuit Court of Appeals in the instant case placed the Ninth Circuit with those circuits which support that view of punitive damages. See, *Molzof v. United States*, 911 F.2d at 21. However, subsequent to the decision in *Flannery v. United States*, the leading case espousing that view, the Ninth Circuit had an opportunity to follow the *Flannery* approach, and the court flatly rejected it.

In *Shaw v. United States*, 741 F.2d 1202, the district court awarded a brain-damaged child $4.7 million for pecuniary damages and $5 million for non-pecuniary damages, including pain and suffering, mental anguish and destruction of his ability to enjoy life. The government contended that the non-pecuniary damages were punitive because the child's injuries were adequately compensated by the pecuniary award. The Ninth Circuit rejected the government's argument and refused to follow *Flannery*. Referring to *Flannery's* ruling that the award in that case of non-pecuniary damages for loss of enjoyment of life exceeded the comatose plaintiff's actual loss and were thus punitive, the *Shaw* court stated:

> The Ninth Circuit has squarely rejected this analysis, however. In *Felder, supra*, we recognized that such an expansive view of federal law would "impinge seriously upon the architecture of the Act which provides for recovery according to the *lex loci delictus*." 543 F.2d at 675. The unique position of the United States as both defendant and tax-collector justified a rule requiring deduction of taxes from awards for lost compensation. But we also refused to prevent the plaintiffs from recovering a component of non-pecuniary damages already delimited as compensatory under state law. *Id.* The proper approach, we decided, is to hold the loss compensable and to reduce the award if a state court would find it excessive. *Id.* at 674. The Sixth Circuit [in *Kalavity*] also refused to adopt the view that any award of damages in excess of a plaintiff's direct or out-of-pocket loss is punitive.

741 F.2d at 1208.

Accordingly, the court did not label the non-pecuniary award as punitive, but only found it to be excessive, and reduced the award to $1 million.

The Ninth Circuit recently again rejected the *Flannery* analysis. In *Yako v. United States*, 891 F.2d 738, an action for medical malpractice was brought on behalf of a two and one-half year old child who was severely brain damaged. The district court awarded the child substantial damages for loss of earning capacity and damages to cover residential care in a facility for handicapped adults. On appeal, the government relied on the ruling of *Flannery* that awards of future care expenses and future lost earnings are punitive because the government is thereby forced to pay twice for a plaintiff's living expenses. The government contended that the district court's awards for lost earning capacity and residential care expenses were duplicative and hence punitive, because much of the earnings of a healthy, working person are used to provide for his own residential care. The government argued, therefore, that the amount which would normally be spent on residential care should have been subtracted from the total lost earnings figure. The Ninth Circuit disagreed, and once again rejected *Flannery*. Relying upon its decision in *Shaw v. United States*, and upon the fact that state law in Alaska permitted recovery for future medical and maintenance costs and for loss of future earnings, the court held that the district court's award was not clearly erroneous.

Like the Ninth Circuit, the First Circuit has also recently altered its view of what it considers to be "punitive damages." Although in *D'Ambra v. United States*, 481 F.2d 14, the First Circuit seemed to adopt the view that an award is punitive to the extent that it exceeds a plaintiff's direct loss, the court recently rejected the very case in which that view was clearly articulated. In *Reilly v. United States*, 863 F.2d 149 (lst Cir. 1988), the district court awarded damages for, among other things, lost earning capacity and anticipated future care to an infant who

sustained severe, permanent brain damage during her delivery at a naval hospital. In response to the government's contention that the award was punitive, the First Circuit rejected the view of *Flannery v. United States* that awards for future care expenses and loss of future earnings are duplicative and therefore punitive. The court stated: "[W]e find *Flannery* to rest on very shaky underpinnings and decline to adopt it as a model for this circuit." 863 F.2d at 165.

The Second and Eighth Circuits have also rejected the *Flannery* approach.

In *Rufino v. United States*, 829 F.2d 354, a comatose plaintiff sought recovery for, among other things, damages for loss of enjoyment of life. The district court held that an award of such damages was not warranted on the facts, because the plaintiff was in a chronic vegetative state with no cognitive awareness. The Court of Appeals for the Second Circuit reversed the district's judgment insofar as it disallowed any consideration of loss of enjoyment of life. In doing so, the court disagreed with *Flannery's* assessment that damages for loss of enjoyment of life are "punitive," and held that punitive damages are those intended as punishment. The court stated:

> We disagree with, and therefore decline to follow, *Flannery*. We agree with the Sixth Circuit that the FTCA's prohibition of punitive damages was designed to prohibit "use of a retributive theory of punishment against the government." *Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978). Even more directly on point, we agree with the Ninth Circuit's explicit refusal to follow *Flannery*, on the ground that the *Flannery* rule would " 'impinge seriously upon the architecture of the Act which provides for recovery according to the *lex loci delictus*.' " *Shaw v. United States*, 741 F.2d 1202, 1208-09 (9th Cir. 1984) (quoting *Felder v. United States*, 543 F.2d 657, 675 (9th Cir. 1976)).

> The purpose of a recovery for loss of enjoyment of life is clearly to compensate for that loss. The fact that the compensation may inure as a practical matter to third parties in a given case does not transform the nature of the damages. Indeed, such a rule, carried to its logical conclusion, would render all damages recovered by a decedent's estate punitive in nature.

829 F.2d at 362.

In *Manko v. United States*, 830 F.2d 831, a man brought an action for injuries he sustained as a result of receiving a swine flu vaccine. The district awarded damages for, among other things, loss of future earnings. On appeal, the Eighth Circuit rejected the government's argument that the district court's failure to reduce the award for loss of earnings by the amount of the plaintiff's tax liability for those earnings amounted to an award of punitive damages. The court held that "punitive damages" must be viewed as they are under traditional principles of tort law, as damages which are based upon the egregiousness of the tortfeasor's conduct and are intended to punish the tortfeasor. The court stated:

> The Tort Claims Act incorporates, as the substantive standard to be applied, the law of the state in which the tort was committed, in this case Missouri. Under Missouri law, damage awards for lost income are not reduced for taxes. (Citation omitted.) . . . [W]e must therefore apply [that rule] in this Federal Tort Claims Act case unless to do so would amount to an award of "punitive damages" within the meaning of that statute. We agree with the plaintiff that such a holding would "require[] a broad and unprincipled definition of the term 'punitive damages.' " Brief of Appellee/Cross-Appellant 41.
>
> Whether to deduct income taxes is simply one of many issues courts face in deciding what is fair compensation for an injury. Other such

> issues are whether to apply the collateral source rule, whether to award prejudgment interest, how certain a forecast of future earnings must be, how to value pain and suffering, and so forth. Different jurisdictions resolve these issues in different ways, but they have nothing to do with "punitive damages" as that term is traditionally used in the law. They do not depend on a finding of wanton or malicious conduct, they are not imposed to punish a defendant, and they have nothing to do with a defendant's net worth—all questions that customarily arise when punitive damages are sought or awarded. We conclude that Congress did not mean to outlaw all variations from some ideal norm of compensation when it forbade "punitive damages." It was referring only to that concept in its traditional sense. It was not error for the District Court to follow Missouri law on the proper treatment of tax liability on hypothetical lost earnings.

830 F.2d at 836.

C. The Conflict In The Circuits Concerning The Definition Of "Punitive Damages" Needs To Be Resolved.

It is evident from the above discussion that the circuit courts of appeal are fairly evenly divided on the question of what definition is to be given to "punitive damages," as that term is used in 28 U.S.C. §2674. Some courts, most notably *Flannery*, define punitive damages to be any damages in excess of the amount necessary to compensate a plaintiff for his direct loss. Other courts follow a more traditional approach and view punitive damages as being those which are based upon the culpability of the tortfeasor's conduct and are intended as punishment. The decision of the Seventh Circuit in this case was merely a matter of choosing sides. It chose the

Flannery view, which it erroneously believed to be the "majority" view. It held that Mr. Molzof could not recover for any future medical care which would possibly duplicate the care he could receive free of charge at Veterans' Administration facilities, because such a recovery would not compensate him, but only benefit his relatives. The court also held that he could not recover for loss of enjoyment of life because, being comatose, he would not be able to receive any benefit from the money.

Until this Court resolves the question of what Congress meant when it prohibited awards of "punitive damages" in Federal Tort Claims actions under 28 U.S.C. §2674, the courts of appeal around the country will continue to utilize conflicting definitions of "punitive damages" in characterizing elements of state law damages and in deciding which such elements of damage are allowed to be recovered in a Federal Tort Claims action. Review by this Court will resolve the conflict among the circuits and result in the establishment of a uniform definition of "punitive damages" for such actions.

II. THE APPELLATE COURT'S DENIAL OF FULL RECOVERY OF DAMAGES FOR FUTURE MEDICAL EXPENSES TO A VETERAN WITH A SERVICE-CONNECTED DISABILITY IS CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEAL.

Under 38 U.S.C. §610, a veteran with a service-connected disability is entitled to receive free medical care from the Veterans' Administration. Robert Molzof had a service-connected disability. The district court determined that because Mr. Molzof was entitled to receive free medical care from the Veterans' Administration, he was not entitled to recover damages for all future medical expenses. Rather, the court determined that he was only entitled to recover an amount which would pay for

medical care necessary to supplement the care he was receiving at the Veterans' Administration hospital where he was a patient. The district court reasoned that an award of all future medical expenses would result in a double recovery and would have a punitive effect on the government. Accordingly, the district court ordered the government to provide Mr. Molzof with the same level of care he was receiving at the Veterans' Administration hospital, and ordered the government to pay for additional aspects of care--physical therapy, respiratory therapy, and doctor's visits--which Mr. Molzof needed, but which were not being provided at the Veterans' Administration hospital. Relying on the definition of "punitive damages" set forth in *Flannery v. United States*, 718 F.2d at 111, the appellate court concluded that to permit Mr. Molzof to recover an amount for future medical expenses in excess of the amount awarded by the district court would be punitive, and would violate the prohibition against punitive damages set forth in 28 U.S.C. §2674.

The appellate court's ruling is contrary to the result reached by other courts of appeal which have addressed the issue of whether a veteran, who is entitled to receive free medical care at Veterans' Administration facilities, should be awarded damages for future medical expenses in an action under the Federal Tort Claims Act.

A. An Award Of Future Medical Expenses To A Veteran With A Service-Connected Disability Has Not Been Held By Other Courts Of Appeal To Be Punitive.

Prior to the appellate court's decision in this case, two courts of appeal had addressed the issue of whether a veteran, who brings an action under the Federal Tort Claims Act, may be compensated for future medical expenses even though the veteran is entitled to receive free medical care at Veterans' Administration facilities. In

both cases, the courts rejected the argument that an award of future medical expenses would result in a double recovery to the claimant. The courts concluded that no double recovery would occur if the claimant chose not to use the government facilities, and that the claimant should be given an opportunity to make that choice.

In *Feeley v. United States*, 337 F.2d 924 (3rd Cir. 1964), the court stated:

> The district court awarded the plaintiff Twelve Thousand Dollars ($12,000) for future psychiatric medical expenses. 220 F.Supp. at 720. The government argues that this was error because the plaintiff's past practice of employing the free government hospital and medical facilities indicate that he will do so in the future. Therefore, the government will be forced to pay twice for this future care, which it is not required to do under the principles which precluded recovery for the past free hospital care.
>
> However, acceptance of the government's position would result in forcing the plaintiff, financially speaking, to seek only the available public assistance. Private medical care would be obtained at the plaintiff's own expense. We think that this is an unconscionable burden to place on the plaintiff. A victim of another's tort is entitled, we think, to choose, within reasonable limits, his own doctor and place of confinement, if such care is necessary. To force a plaintiff to choose between accepting public aid or bearing the expense of rehabilitation himself is an unreasonable choice. The plaintiff may not be satisfied with the public facilities; he may feel that a particular private physician is superior; in the future because of over-crowded conditions he may not even be able to receive timely care. These are only a few of many considerations with which an individual may be faced in selecting treatment. The plaintiff's past use of the government facilities does not ensure his future use of them. He will now have the funds available to him to enable him to seek private care. He should not be denied this opportunity.
>
> It is true that if the plaintiff should decide to seek care from the Veterans' Administration, the defendant may well be paying twice for the same element of damages. However, this is dependent on whether the government can refuse to render free care. This factor, however, should not be a consideration in awarding damages under the Federal Tort Claims Act, but rather is a policy judgment to be made in the administration of veterans' benefits.

337 F.2d at 934-35.

The Second Circuit Court of Appeals has followed the reasoning of the Third Circuit in *Feeley*. In *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078 (2nd Cir. 1988), the court allowed compensation for future medical expenses, and reversed the decision of the district court which had denied such benefits. In addressing the issue of compensation for future medical expenses where the injured party is entitled to free care in the future, the court stated:

> It should be pointed out that any award for future medical expenses should not be limited on the ground that, as a veteran, plaintiff is entitled to free VA medical care, hospitalization, and institutionalization. He is not obligated to seek medical care from the party whose negligence created his need for such care simply because that party offers it without charge. Moreover, it is not relevant that Ulrich has sought treatment from VA hospitals in the past. He has a right to select a doctor or private hospital of his own choice for his future medical needs. *Feeley v. United States*, 337 F.2d 924, 934-35 (3d Cir. 1964); *Powers [v. United States]*, 589 F.Supp. at 1108-09; *Christopher [v. United States]*, 237 F.Supp. at 798-99. Thus, the district court's failure to award future medical expenses

> was erroneous if and to the extent it relied on the premise that the VA will provide plaintiff free care in the future. That this might result in a windfall for him is a matter for Congress, not the courts.

853 F.2d at 1084.

Neither *Feeley* nor *Ulrich* held that an award of future medical expenses to a veteran who is entitled to receive free medical care is punitive merely because there is a possibility that the veteran will seek the free care and thus receive a windfall from the damage award. The appellate court's conclusion in this case that such an award would be punitive is, therefore, without precedent.

B. The Appellate Court's Refusal To Give Mrs. Molzof An Opportunity To Choose The Facilities Where Mr. Molzof Would Receive Medical Care Is Contrary To The Public Policy Expressed In *Feeley* And *Ulrich*.

Although the appellate court in this case recognized, consistent with *Feeley* and *Ulrich*, that it would be unreasonable to obligate a tort victim to seek continued medical care from the party whose negligence created the need for such care, that is exactly the effect of the appellate court's decision. The court held that Mr. Molzof was not entitled to a full recovery for future medical expenses, because Mrs. Molzof had not sufficiently established that she intended to transfer Mr. Molzof to a private hospital facility. Accordingly, the court affirmed the judgment of the district court which *ordered* the government to provide Mr. Molzof with the same level of care he had been receiving at the Veterans' Administration Hospital in Tomah.

The appellate court essentially held that in order for a veteran to recover future medical expenses in a situation such as this, he or she must conclusively establish

that he or she will seek medical care from private facilities in the future, rather than from a Veterans' Administration facility. However, this holding is directly contrary to the premise of both the *Feeley* and *Ulrich* cases, which is that the plaintiff must be given the *opportunity to choose* between private facilities and Veterans' Administration facilities. Those cases specifically state that the plaintiff should not be *forced* to choose the Veterans' Administration facilities.

The appellate court's determination that Mr. Molzof should be forced to obtain his medical care from the Veterans' Administration because of a lack of proof that medical care would be obtained from private facilities, is also in direct violation of the public policy expressed in *Feeley* and *Ulrich* that a plaintiff should not be forced to obtain medical care from the tortfeasor whose negligence necessitated the medical care.

C. The Possibility Of A Double Recovery Is A Matter For The Legislature, Not The Courts.

The appellate court held that since Mrs. Molzof had not proven that she would transfer her husband to private medical care facilities, any award for future medical expenses greater than that provided by the district court would result in a double recovery. However, the legislative scheme, as it presently exists, permits the possibility of a double recovery. If this possibility is to be eliminated, it is a matter for the legislature, not the courts.

Title 38, U.S.C. §610 provides that a veteran with a service-connected disability is entitled to receive free medical care from the Veterans' Administration. The statute does not provide for a denial of care or for an off-set of the cost of the care in the event that the veteran brings a claim against the government under the Federal Tort Claims Act.

Both *Feeley* and *Ulrich* specifically point out the fact that an award of future medical expenses may result in a double recovery, but they note that such a double recovery is allowed under the legislative scheme, unless Congress acts to amend the law. In *Feeley v. United States*, 337 F.2d at 935, the court stated that the mere fact that the plaintiff may decide to seek future care from the Veterans' Administration "should not be a consideration in awarding damages under the Federal Tort Claims Act, but rather is a policy judgment to be made in the administration of veterans' benefits." Similarly, in *Ulrich v. Veterans Administration Hospital*, 853 F.2d at 1078, the court stated:

> [T]he district court's failure to award future medical expenses was erroneous if and to the extent it relied on the premise that the VA will provide plaintiff free care in the future. That this might result in a windfall for him is a matter for Congress, not the courts.

The *Ulrich* court then cited with approval the case of *Powers v. United States*, 589 F.Supp. 1084, 1109 (D.Conn. 1984), where the district court ruled that future medical expenses were compensable in a situation like this, stating:

> The Court wishes to emphasize, however, that proper Congressional action, such as tying in the set-off provision of 38 U.S.C. §351, infra, to the medical treatment available to veterans under 38 U.S.C. §610 et seq. would eliminate not only the windfall conundrum which confronts and concerns federal courts under these, or similar circumstances, but also protect the federal treasury from the threat of an unnecessary double payment for the same injury.

The appellate court's denial of an award to a veteran for future medical expenses, simply because free medical care is available from the Veterans' Administration, is contrary to the holdings of both *Feeley* and *Ulrich*.

Title 38, U.S.C. §610 must be contrasted with 38 U.S.C. §351, which applies to Federal Tort Claims actions against the government where a veteran is receiving disability benefits. In §351, Congress saw fit to deal with the issue of double compensation for disability benefits. That statute provides that if an individual either receives an award or enters into a settlement in an action under the Federal Tort Claims Act, then disability benefits are to be suspended "until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise." 38 U.S.C. §351. Thus, if a veteran is receiving disability benefits, and he brings a tort action against the government and recovers damages for impairment of earning capacity, the disability benefits are suspended until an equivalent amount has been exhausted from the tort recovery.

Just as in 38 U.S.C. §351, where Congress set out a scheme to preclude the possibility of a double recovery in a Federal Tort Claims action if the veteran is receiving disability benefits, Congress could also have enacted a similar provision to avoid the potential for a double recovery in a Federal Tort Claims action if the veteran is entitled to receive free future medical care under 38 U.S.C. §610. Congress could have either provided for a suspension of the entitlement to free medical care until such time as the fund established pursuant to the award in the Federal Tort Claims action had been depleted, or, in the alternative, Congress could have provided that the Veterans' Administration would provide the care, but then charge the cost of the care back to the veteran. However, Congress did not enact such a provision, and in the absence of such a provision, the appellate court had no right to deny an award of future medical expenses to Mr. Molzof.

CONCLUSION

There is a continuing conflict among the circuit courts of appeal concerning the meaning which is to be given to the term "punitive damages" as it is used in 28 U.S.C. §2674. That conflict needs to be resolved by this Court.

The denial by the appellate court of an award of future medical expenses under the Federal Tort Claims Act to a veteran with a service-connected disability is contrary to the decisions of other courts of appeal which have permitted such an award.

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-2960

SHIRLEY M. MOLZOF, as personal representative of the Estate of ROBERT E. MOLZOF,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District Of Wisconsin.
No. 88-C-904-S – John C. Shabaz, *Judge.*

ARGUED MAY 10, 1990 – DECIDED AUGUST 30, 1990

Before COFFEY and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Shirley Molzof, as personal representative of the estate of Robert Molzof, appeals from that portion of the judgment of the district court denying her an award under the Federal Tort Claims Act (Act) 28 U.S.C. §§ 2671-2680 for her husband's future medical expenses and for his loss of enjoyment of

life.[1] Because we agree that these damages fall within the scope of the punitive damage exception to the Act's waiver of sovereign immunity, we affirm the district court's denial of this award as non-compensable.

I. BACKGROUND

On October 31, 1986 Robert Molzof underwent surgery at the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin to remove the upper right lobe of his lung. As part of his post-operative care, Molzof was temporarily placed on a ventilator. Thereafter, due to the conceded negligence of hospital employees, the alarm system on his ventilator was disconnected. While so detached, the tube providing life sustaining oxygen was also disconnected. When these disconnections were discovered eight minutes later, Molzof's heart feebly beat at between 30-40 beats per minute and he was not breathing. By the time a physician arrived, Molzof was in complete cardiac arrest. Since he was not resuscitated until nearly a half an hour later, he suffered anoxic encephalopathy. In layman's term, his brain was irreversibly damaged due to oxygen deprivation. This damage left Molzof in a permanent vegetative state requiring a ventilator for breathing and a

[1] Robert Molzof's claim was originally brought by his guardian ad litem Thomas H. Geyer. After the entry of final judgment but before the filing of the notice of appeal, Robert Molzof died. Accordingly, pursuant to Rule 43 of the Federal Rules of Appellate Procedure, the parties filed a stipulation with this court substituting Shirley Molzof as personal representative of the estate of Robert E. Molzof.

nasogastric tube for nutrition and hydration. Responding only to pain and tracheal stimulation, Mr. Molzof was intellectually dead.

Shirley Molzof sued the United States under the Federal Tort Claims Act for the damages she and her husband incurred as a result of its employees' negligence. Since the United States admitted liability, the case proceeded to a bench trial solely on the issue of damages.

After studying Molzof's medical records and considering extensive testimony from three expert medical witnesses which revealed a history of excessive alcohol and tobacco abuse, a diabetic condition, an ongoing inflammation of the liver, a former cancer, a former pancreatic condition, and a pulsating, discolored mass in his right inguinal area, Judge Shabaz predicted the plaintiff's life expectancy to be three years from the date of trial. The court further found that the care currently provided to Molzof free of charge by the Veteran's hospital was reasonable and adequate.[2] In addition, the court concluded that the plaintiff's wife, Shirley, was, with few exceptions, satisfied with those services and had no present intention to transfer him from the Veterans hospital to a private facility. Finally, since there was no indication that the level of care at neighboring hospitals would equal that provided at the Veterans hospital, the court concluded that it was in the plaintiff's best interest to remain at the

[2] Pursuant to 38 U.S.C. § 610 a veteran with a service-connected disability is entitled to receive free medical care from the Veterans Administration. Since Robert Molzof had a service-connected disability the government had a pre-existing duty to provide him with free medical care.

Veterans hospital. Based on these findings, the court ordered the continuation of the same level of care by the Veterans hospital and awarded damages to Robert Molzof in the amount of $75,750 for future medical expenses. This award paid for physical therapy, respiratory therapy and full-time doctor visits deemed necessary to supplement the care he received at the Veterans Hospital. Since Mr. Molzof's chronic comatose condition precluded him from even being cognizant of any damage award, the court denied damages for his loss of enjoyment of life. The plaintiffs appeal seeking damages for Molzof's future medical expenses and his loss of enjoyment of life.[3]

II. DISCUSSION

Prior to the enactment of the Federal Tort Claims Act, the doctrine of sovereign immunity, a shield protecting the government from liability for torts committed by its employees, was abrogable only by a private bill in Congress. *Dalehite v. United States*, 346 U.S. 15, 24-25, 346 S.Ct. 956, 962, 97 L.Ed. 1427 (1953). In 1946, however, "feeling that the Government should assume the obligation to pay damages for the misfeasance of employees carrying out its work," *Id.*, and recognizing the "notoriously clumsy" nature of the private bill device, *Id.*, Congress lowered this shield, and accepted liability as respondeat superior for injuries caused by the negligent or wrongful conduct of its employees. 28 U.S.C. § 1346(b), *Laird v. Nelms*, 406 U.S. 797, 805, 92 S.Ct. 1899, 1903, 32 L.Ed.2d 499 (1972).

[3] Shirley Molzof was awarded $150,000 for past and future loss of consortium. The sufficiency of this amount is not challenged on appeal.

This immunity waiver is not, however, without qualification or exception. While the Act broadly holds the Government liable under state law "to the same extent as a private individual under like circumstances," in the same breath it bars awards of punitive damages. 28 U.S.C. § 2674. Indeed, in a separate section the Act excludes all claims arising from the intentional misconduct of Government employees. 28 U.S.C. § 2680(h). Thus, measuring damages under the Act involves a two-prong process. To ascertain liability and measure damage, a federal court is directed to apply the state law governing the situs of the Government's wrongful act or omission.[4] The court thereafter applies federal law to determine if any part of the award is barred as punitive. *Flannery v. United States*, 718 F.2d 108, 110 (4th Cir. 1983), Comment at 251-52.

A. *Future Medical Expenses*

While the district court determined that Molzof established with sufficient certainty under Wisconsin law his need for future medical care and the cost thereof, it denied as punitive any amount in excess of the $75,750 award supplementing the ordered care provided by the Veterans Hospital. In so ruling, the court reasoned that since there was no showing that a private facility would provide the plaintiff with care of similar or superior quality to that provided by the Veterans Hospital, no indication that a transfer would be in the best interest of

[4] 28 U.S.C. § 1346(b), *See*, Comment, *Defining Punitive Damages Under the Federal Tort Claims Act*, 53 U. Cin. L. Rev. 251 (1984).

the patient, and no expression of dissatisfaction or intention of Mrs. Molzof to transfer her husband to another institution, ordered care at the Veterans Hospital was held to be the only appropriate remedy. Since "[i]t would seem incongruous at first glance that the United States should have to pay in tort for hospital expenses it had already paid," *Brooks v. United States*, 337 U.S. 49, 53, 337 S.Ct. 918, 93 L.Ed. 1200 (1949), the court deemed a monetary award for the value of medical services already provided by the VA at no charge to the plaintiff to be a double recovery whose effect would be punitive. We agree with both this reasoning and result.

Since it is well settled that the purpose of the Act is compensation, the majority of circuits define "punitive damages" under the Act as any damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort. Comment at 258. Whether or not an award carries with it the deterrent and punishing attributes typically associated with the word "punitive", to the extent that an award gives more than the actual loss suffered by the claimant it is punitive and nonrecoverable. *Flannery v. United States*, 718 F.2d 108, 111 (1983). *Accord D'Ambra v. United States*, 481 F.2d 14, 16 (1st Cir.), *Hartz v. United States*, 415 F.2d 259, 260 (5th Cir. 1969); *Felder v. United States*, 543 F.2d 657, 660 (9th Cir. 1976) *but see, Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978); *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078 (2nd Cir. 1988); *Rufino v. United States*, 829 F.2d 354 (2nd Cir. 1987).

This does not mean that any award for future medical expenses is limited because as a veteran the plaintiff is entitled to free medical care and hospitalization. *Ulrich v.*

Veterans Administration Hospital, 853 F.2d 1078, 1084. Indeed, we agree it would be unreasonable to *obligate* a tort victim to seek continued medical care from the very party whose negligence created his need for such care simply because that party offers it without charge. *Id.*

> The plaintiff may not be satisfied with the public facilities; he may feel that a particular physician is superior; in the future because of overcrowded conditions he may not even be able to receive timely care. These are only a few of many considerations with which an individual may be faced in selecting treatment.

Feeley v. United States, 337 F.2d 924, 934 (3rd Cir. 1964).

However, where, as in this case, the court determines that the Veterans facility provides the best level of care, that it is not in the plaintiff's best interest to be moved, that the plaintiff's wife is satisfied with the level of care, that she has no present intention to transfer the plaintiff, and that the plaintiff's short life span minimizes the likelihood of changed circumstances, we believe it is more than reasonable for the court to conclude that a $1.3 million award, sought ostensibly for future medical expenses, would more likely be employed to line the plaintiff's, or, more precisely, his relative's pockets.

B. *Loss of Enjoyment of Life*

While Wisconsin has long permitted the recovery of damages for "*diminished capacity* for enjoying life", *Benson v. Superior Mfg. Co.*, 147 Wis. 20, 132 N.W. 633 (1911), its courts have not indicated whether a comatose plaintiff, with no conscious awareness of his *complete loss* of enjoyment of life, is entitled to recover damages for that loss.

Equally unresolved in this circuit is the issue of whether the Federal Tort Claims Act bars as punitive such an award to a comatose patient because the award could provide him with no cognizable benefit. While we remain unguided as to Wisconsin's probable resolution of its tort law issue, we need not blindly divine their law, for we conclude that even if Wisconsin courts recognized the claim for loss of enjoyment of life, in this case it would be barred as punitive under the Federal Tort Claims Act.

In addition to the difficulty normally associated with the resolution of issues of first impression, our inquiry is made even more trying by the articulation of conflicting viewpoints from our cousins in the Second and Fourth circuits. Based on the minority view "that the FTCA's prohibition of punitive damages was designed to prohibit 'use of a retributive theory of punishment against the government,' " *Rufino v. United States*, 829 F.2d 354, 362 (2nd Cir. 1987), *citing Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978), the Second Circuit awarded damages for loss of enjoyment of life to a comatose plaintiff. In so doing the court noted that despite the absence of conscious awareness, "[t]he purpose of a recovery for loss of enjoyment of life is clearly to compensate for that loss." *Id.* Conversely, based on the prevailing view that damages in excess of those necessary to compensate for "injuries suffered by the claimant" are "punitive" whether or not they carry with them "deterrent and punishing attributes," the Fourth Circuit denied as punitive damages for loss of enjoyment of life to a comatose plaintiff in a condition as lamentable as Mr. Molzof's. *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983).

While recognizing the plaintiff's grievous loss, the court reasoned that a monetary award to a plaintiff who is conscious of nothing and incapable of enjoying nothing could scarcely compensate him for his loss. Indeed, since the comatose plaintiff could not even experience the pleasure of giving the money away, the court concluded that such an award could only benefit the plaintiff's unscathed relatives.

Since we believe that the Act excludes damages in excess of those necessary to compensate for injuries suffered by the plaintiff and because we are equally confident that an award of damages for loss of enjoyment of life can in no way recompense, reimburse or otherwise redress a comatose patient's uncognizable loss, we adopt the Fourth Circuit's view and deny the award under the circumstances and findings in this case.

III. CONCLUSION

Because we hold that the district court did not commit error in concluding in this case that an additional award of damages for future medical expenses and loss of enjoyment of life were properly characterized as "punitive" and hence barred under the Federal Tort Claims Act, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ROBERT E. MOLZOF, et al.,

Plaintiffs,

v. Case No. 88 C 904 S

UNITED STATES OF AMERICA,

Defendant.

DAY 3 TRIAL
BEFORE THE HONORABLE JOHN C. SHABAZ
Court Recorder Operator: Mark T. Doerr
Madison, Wisconsin
June 23, 1989
10:30 O'clock A.M. - 12:43 O'clock P.M.

[p. 328] THE COURT: The Court at this time will make its findings of fact and conclusions of law reserving the right to [p. 329] supplement its opinion from the bench where that supplementation may be appropriate. The Court will accept the stipulation entered into between the parties, that stipulation of the uncontested facts which has been set forth in the joint final pretrial

report. Those paragraphs for ready reference in that joint statement of uncontested facts are paragraphs 1 through 26, excluding paragraphs 22 and 23 and are found at pages 1 -- strike that -- 2 through 8 of the final pretrial conference report.

As its next finding, based on the testimony of Drs. Keith Sperling, Harvey M. Golomb and Henry Alba, the plaintiff Robert E. Molzof has a life expectancy of 5 years 8 months. This is a reasonable determination of his life expectancy from November 2 of 1986, and 32 months have passed between that date and the time of trial leaving a life expectancy of 3 years from the present date. In considering this period as the appropriate finding for the plaintiff Robert E. Molzof's life expectancy, the Court considered the testimony of the three expert witnesses, considered the ranges to which each of them testified, considered the medical records summarized in exhibit number 2, the plaintiff's history of excessive alcohol and tobacco abuse, diabetic condition, comatose condition, neurological status, the pulsating mass in his right inguinal area, which is hard and firm which presently is pulsating, discolored and bruised, whether it be an aneurysm, a pseudoaneurysm or a distended [p. 330] graft, the ongoing inflammation of liver, former pancreatic condition, his present age, the possible recurrence of cancer and believes that the life expectancy to be attributed to this plaintiff is substantially less than were these same conditions found in a person of substantially younger years. And accordingly, the Court makes that first appropriate finding in this matter.

The Court also finds that the plaintiff is receiving at the Veterans hospital at Tomah reasonable, necessary and

adequate care. The Court finds that a physician assistant examines the plaintiff once per week. A physician examines the plaintiff once per month. That his vital signs are taken on a daily basis, at least on more than one occasion. That the level of the nursing care is appropriate, necessary and reasonable. That he can remain off of the ventilator for a sufficient period of time for showering. That there are no skin problems or breakdown. That he is provided hand splints on a -- 8 hours per day. That he is not receiving occupational therapy. That physical therapy has been discontinued. That infections are controlled in a closely monitored situation, the infections being substantially less here at Tomah than on the national average. The Court finds that the occupational therapy which has been provided to him with the hand splints is all of that occupational therapy which is necessary. This may be a mixed finding and conclusion of law. It's not meant to be [p. 331] but rather than to revert to each finding and conclude, the Court believes it's appropriate to have a mixture from time to time if that indeed should occur. The Court determines that the physical therapy was discontinued for lack of staffing only and the fact is that the Court also determines that the pulmonary function technician is an individual who needs additional staffing. That the plaintiff is closely supervised, is receiving successful care. That his wife, the co-plaintiff, Shirley M. Molzof is satisfied with those services which have been provided except her concern with the lack of communication with the medical profession concerning her husband. She's concerned with the failure to provide physical therapy and she is concerned with the fact that medical visits are given once per month rather than more often. And

she is, however, appreciative of those efforts provided for the nursing care except for those items to which the Court has previously referred.

The Court further finds that there has not been shown to the satisfaction of this Court the availability of additional places of care. The Court specifically finds that the University Hospital is not available. That St. Lukes is not available. That St. Marys is not available. That Meriter Hospital, I believe formerly known as Madison General may be available but the Court does not believe that the plaintiff has met his burden to the -- by a preponderance of the evidence to demonstrate that that care provided there would be the same or [p. 332] similar to that provided at the Veterans Administration.

The Court further finds that the medical testimony is -- that medical testimony most favorable to the plaintiff would suggest that the plaintiff not be transferred. The Court further finds that there is no present intention upon the part of Mrs. Molzof to transfer her husband to another institution. The Court in its examination of that testimony provided by Mrs. Molzof is of the opinion that except for those three items which the Court has previously articulated, she is well satisfied with the care which her husband has been receiving.

The Court finds that Mrs. Molzof is a caring and concerned loving wife, attentive to her husband's needs as best she is able. That there is at the Veterans Administration Hospital in Tomah a physical therapy staffing shortage, lack of sufficient respiratory therapists and a lack of weekly visits by the doctor. There has been no showing as the Court has previously stated that better

care is available at another institution, that there is a present intent to transfer the plaintiff to another institution and the Court concludes -- prior to doing that, the Court will make an additional finding as to those medical costs which are available to provide similar treatment to the plaintiff at a private institution which the Court at this time finds that such similar treatment has not been satisfactorily demonstrated and then must place an evaluation from that testimony previously offered as to the going rate, if [p. 333] you will, for an institution which could be found to be similar to the Veterans Administration Hospital at Tomah and finds that from its examination of the testimony of Mrs. Rizio and that of Dr. Alba and attempting to equate the services provided at those institutions previously referred to the Court's attention by those witnesses, that the per diem is $915 per day annualized at $333,975. The Court believes that those other expenses of care set forth in the stipulation and the plaintiffs' proposed findings of fact are appropriate if indeed they were warranted. Respiratory therapy, $54,750 which is $50 per visit, 3 visits per day. Physical therapy at $50 per visit, 1 visit per week or $2,600. Occupational therapy at $600 which is $50 per visit, 1 visit per month. Disposable equipment to which there's been a stipulation $37,388.88; medication stipulated $12,229.13 and medical attention $2,340.

The Court then does provide an annualized total of those figures which it has previously found; that total to be announced once the Court totals it once again while making its additional findings in this matter.

The Court finds that the plaintiff Robert Molzof is in a vegetative state and further that prior to the injury

which occurred on November 2 of 1986 the plaintiffs had been married for 37 years. They had an average marriage with the usual trials, tribulations, discords which may be expected in most marriages. There is evidence to indicate they enjoyed one [p. 334] another's company, and the Court will at this time address itself to those conclusions of law which it believes to be appropriate.

As it concerns the medical expenses, the Court first refers to the language in Brooks against the United States, 337 US 49, page 53. "We see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability payments. It would seem incongruous at first glance that the United States should have to pay in tort for hospital expenses it had already payed, for example." The Court further addresses that language of Judge Evans in Green against United States, 530 Federal Supplement 633, a 1982 decision at page 644. "However, the question on which Wisconsin law does not control is whether a benefit received from the government is in fact collateral to a Federal Torts Claims Act judgment. To answer that question, one must look to federal law. Courts analyze the questions of whether VA benefits are collateral to a Federal Torts Claims Act judgment by discussing whether the fund from which each is paid is the same. Both are paid out of the general treasury and to allow plaintiff to recover both is to allow a double recovery from the same source." The Court then refers to Feeley against the United States in 337 Federal 2nd 924 at 927 which is the 3rd circuit in 1964. "To allow the plaintiff to recover for [p. 335] this item in his damages would not only result in

a double recovery for him, but also a double payment out of the general treasury by the United States." Plaintiffs' damage award here will not include his expenses incurred at the Veterans Administration. There's not of course that attempt to recover those expenses from the time of the injury to present but the Court believes that that language is appropriate to prospective damages as well where there is no intent whatsoever to use the facility which is presently available.

The Court is well aware of Ulrich and will recall the language in Ulrich against Veterans Administration Hospital at 853 Federal 2nd 1078, the 2nd circuit, 1988. "Ulrich next urges that the district court erred in refusing to award future medical expenses. Why the Court turned down his request from this -- for this item of damages is unclear. The Court first noted, 'That plaintiff will receive medical care, hospitalization and if necessary, institutionalization from Veterans Administration at no charge. Consequently, there will be no award to plaintiff for such services.' Beyond this, the trial court held that the VA's aid and attendance allowance adequately covered the cost of personal home care services recommended by a rehabilitation counselor." The Court concluded that the district court's failure to award future medical expenses was erroneous if and to the extent it relied on the premise that the VA will provide plaintiff free care in the future. The [p. 336] Court believes that, as it said at the conclusion of Mr. Humphrey's motion to dismiss, this indeed was a close question and that there are certain elements here that obviously were not found in Ulrich.

First of all, the Court concludes it's not in the best interest of the plaintiff to move him from the Veterans

Administration facility to those other hospitals which have not shown their availability or qualifications to provide this same high degree of medical care. The Court further finds that by a preponderance of the evidence, there is no intention to have Mr. Molzof moved to another facility. The Court is of the opinion that the care presently provided is adequate, reasonable and necessary which the plaintiff -- with which the plaintiff's spouse is well satisfied and for which, however, she has designated certain concerns which the Court will refer to later in this opinion.

The Court believes that the plaintiff is entitled to adequate, necessary and reasonable hospitalization at the level to which he is presently receiving that hospitalization and that that should continue through the rest of his life. That is appropriate to be provided to him. He should receive that or its equivalent and the Court believes that he is receiving that -- those appropriate medical services or its equivalent except in three areas. Those three areas relate to first of all, physical therapy. The Court believes that in addition to [p. 337] that care which he is presently receiving, he should receive physical therapy at $50 per visit for at least one visit per week, in the amount of $2600. The Court's of the opinion that there is a need for additional respiratory therapy or staffing relating to this concern and that the present provisions should be increased in the amount $18,250 which would be one additional visit per day at $50 per day and that amount of $18,250 is annualized. The Court further believes that additional medical attention would be appropriate and believes that that is an additional amount of $1800. The

court multiplying the $45 per visit by 52 and then subtracting those 12 visits which are presently being provided for an additional of $1800. The Court then determines that the future medical needs or the equivalent thereof which have not been thus far provided and should be provided in the future is $25,250 per year annualized at $75 -- annualized or for the 3 year period $75,750. The Court further believes that from its examination of the Federal Torts Claims Act, not only would the -- an award in addition -- not only would an award greater than that which has been provided for the Court for future medical needs be a double recovery but would be punitive in nature to the defendant wherein the defendant would be providing medical care through the balance of the plaintiff's life and nonetheless making an award for future medical needs which would not be utilized for that care and the Court specifically finds that the dollars would -- by a [p. 338] preponderance of the evidence, that the dollars awarded for future medical needs would not be used for that purpose.

The Court next concerns itself with those findings which are to be necessary concerning the element of loss of enjoyment of life. In his last year before the tragic operation and accident, the plaintiff, Mr. Molzof was in excruciating pain, having received, the Court, his testimony, recalls 497 emergency injections during that last year. The Court determines that the plaintiff, during that period of time, was unable to enjoy those previous pleasures in which he was involved during the preceding years because of that excruciating pain and those illnesses which he had sustained and suffered during that period. The Court examines Flannery or Flannery against

United States, 718 Federal 2nd 108, a 1983 decision, page 111. "There is no doubt that Flannery has lost 'his capacity to enjoy life.' He is conscious of nothing and incapable of enjoying anything. In his condition, he is quite susceptible to infections, but with proper care, he may have a life expectancy of at least as much as 30 years from the date of his injury. There is no likelihood whatever that he will ever become aware of anything. The Supreme Court of Appeals of West Virginia held that as a matter of State law damages for the loss of the capacity to enjoy life were assessable upon an objective basis and it did not matter that this particular plaintiff is unaware of his loss. It is perfectly clear, however that an award of [p. 339] $1,300,000 for the loss of enjoyment of life cannot provide him with any consolation or ease any burden resting upon him. It provides -- he cannot spend it upon necessities of [sic] pleasures. He cannot use the $1.3 million. He cannot experience the pleasure of giving it away. If paid, the money would be invested and the income accumulated until Flannery's death, when it would be distributed to those surviving relatives of his entitled to inherit from him. If it is compensatory in part to anyone, it is compensatory to those relatives who will survive him. Since the award of $1.3 million can provide Flannery with no direct benefit, the award is punitive and not available under the Federal Torts Claims Act."

Judge Mimm, in his assessment of Nemmers cites Flannery in Nemmers against United States, 681 Federal Supplement 567, the Central District of Illinois, a 1988 case, in which he recites Flannery, discusses the same concerns in Flannery that we have in the Nemmers case and this case and quotes 28 USC section 2674 of the tort

claims act: "Damages generally are determinable under State law for the United States is to be held liable to the same extent as a private individual under like circumstances. But there is a qualification, the relevance and importance of which is now clearly apparent. Punitive damages are not allowable. The Federal Torts Claims Act is a waiver of immunity from suit of the United States and conditions attached as to the waiver must be strictly enforced." And the Court in [p. 340] Nemmers discusses the same concerns that Judge Hainsworth discussed in Flannery and the Court has those same concerns.

The Court has carefully examined the instructions and the law concerning past and future disability which is our Wisconsin civil jury instruction 1750. "You will answer this question by inserting such a sum of money as you are satisfied will fairly and reasonably compensate the plaintiff for such impairment of his health, physical abilities and bodily functions as you are satisfied he has suffered to date and is reasonably certain to suffer in the future as a consequence of his injuries. In arriving at your answer to this question, you will consider what extent his injuries have impaired and will impair his ability to enjoy the normal activities, pleasures and benefits of life."

The Court notes that in Nemmers, Judge Mimm was faced with essentially the same problem that this Court is facing as to whether or not the State law should prevail and this Court is of the opinion as is the Flannery Court and the Nemmers Court that the dollars which would be awarded this plaintiff for loss of the enjoyment of life would indeed be not in any way compensatory to him. And if they are not compensatory, the Court is of the opinion that they are punitive in nature and may not be

awarded. The Court will find that from its assessment of those -- of that limited loss of enjoyment of life, referring it to the previous year in which he found himself to being less than [p. 341] satisfied with life's surroundings, that the award would be minimal, would not approach of course the $1.3 million which they were discussing in Flannery, but would be in the amount, and the Court will make the finding that the amount for loss of enjoyment of life would have been in the amount $75,000 which amount is not provided under those decisions previously suggested.

The Court yesterday, in referring to its notes, granted the motion to dismiss as it relates to the claim of shortened life expectancy. The Court believes that it should make a more appropriate articulation of its reasons, particularly as a result of its inability to read the notes which it had taken of the cases when anticipating that the motion would be made at the end of trial rather than at the conclusion of the plaintiffs' case. DePass against United States which Judge Posner writes was not only dicta but was in a dissent as well. The Court at one time said dicta, then it said dissent and then it went back and reexamined the case at 721 Federal 2nd 203, a 7th circuit 1983 decision in which he did state at page 208 in his dissent, "Although few reported cases deal with the specific question whether a reduction in life expectancy is compensable, the trend is toward allowing recovery in such cases." The Court does not find that trend to have occurred in Wisconsin and is more convinced by the language in Kwasny against United States, 823 Federal 2nd 194, a 7th circuit opinion, 1987 which [p. 342] is

written by Judge Posner in which he then writes: "Illinois, whose substantive law governs this case, does not permit recovery in a wrongful death suit of the loss of utility to the decedent from having his life cut short. The only thing that you can -- the only thing that can be recovered is the pecuniary loss to the survivors. It is true that the decedent's own suit for personal injury survives his death, but such is suit at least as conventionally conceived is a suit for the loss sustained by him during his lifetime and not for the loss of utility from dying prematurely. The qualification is important." And the Court then reexamined the wrongful death statute in Wisconsin in which it clumsily analogized the Kwasny decision to chapter 895 of the Wisconsin Statutes and refers now to 895.04 -- plaintiff in wrongful death actions (4). "Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action." This is for a pecuniary injury; does not extend to those years beyond death except for those statutory concerns such as loss of earning capacity, which we don't have here. And for those specific items which are capped to include loss of consortium which is capped at $50,000 in that provision. But this Court would specifically liken this case as to a -- as it relates to those years after death as a belated wrongful death caused by the plaintiff for those years after the -- for those additional years which could have been assumed would have [p. 343] been lived by this plaintiff, had the accident not occurred. And I don't find the trend and neither does Judge Posner in his subsequent comments in Kwasny.

The Court then has before it the claim of the plaintiff, Shirley Molzof, which is for the loss of companionship, the loss of her husband's limited services, the loss of the love and affection and she has suffered a loss of society and the companionship of her husband as a result of the negligence of employees of the United States and has incurred and will incur damages for loss of that society and companionship of $150,000 for which judgment will be entered in her favor against the United States in this matter.

MR. ROTTIER: Judge, I didn't catch the numbers. 115 or 150?

THE COURT: 150. 50. 1-5-0. The Court now takes a moment to gather together its notes to address those items which, in this wealth of materials and law books, may have escaped its observation before adjourning. I regret that it's taken this period of time to find the one item that I wish to place in the record prior to our adjournment. It will be a part of the order which I will have entered in this matter. It will be a brief supplementation to those remarks which the Court has made and at this time the Court will order that judgment be entered in favor of the plaintiff, Robert E. Molzof by his guardian ad litem, Thomas H. Geyer for those specific [p. 344] items of damages previously articulated for physical therapy, respiratory therapy and full-time doctor visits in the amount of $75,750 and for an award of reasonable, necessary and adequate hospitalization during his lifetime from the Veterans Administration, those amounts previously suggested by the Court or ordered by the Court to augment those reasonable services which are presently being provided. And further that judgment be entered in favor of

the plaintiff, Shirley M. Molzof against the defendant, United States of America, in the amount of $150,000 together with costs in each instance. Is there anything further to bring before the Court at this time by the plaintiffs?

MR. ROTTIER: The only item that crossed my mind, Judge, is whether you prefer at this time to make a finding regarding whether or not there was a shortened life expectancy in spite of your legal ruling regarding lack of recoverability.

THE COURT: I haven't considered that in the alternate and have not designated that particular period. It may very well be that when I supplement that, I'll take that concern that you have expressed under advisement and when I issue the order for judgment, may very well include that if indeed I believe it to be appropriate to do so.

MR. ROTTIER: And if I may address one question to the Court. Am I to understand that the portion of the judgment mandating reasonable, necessary and adequate care at current [p. 345] levels is essentially to have the same effect as a permanent injunction requiring those, enforceable in the event they are not met?

THE COURT: This Court has continuing jurisdiction of a matter of this nature and I plan to have that enforced whenever it has been brought to my attention that there has been a failure to do so.

MR. ROTTIER: Those are the only matters I had in mind.

THE COURT: Mr. Humphrey?

MR. HUMPHREY: Nothing from the government, Your Honor.

THE COURT: Alright I wish to thank counsel and your witnesses for their concise and informative presentations and we are adjourned.

RECORDER: All rise. This honorable Court now stands adjourned.

(12:43 P.M.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT E. MOLZOF, by
his Guardian ad Litem,
Thomas H. Geyer, and
SHIRLEY M. MOLZOF,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM
AND ORDER

88-C-904-S

Trial to the Court was held in the above entitled matter on and between June 21 and June 23, 1989, the plaintiffs having appeared by Habush, Habush & Davis, by Daniel A. Rottier, and the plaintiff Robert E. Molzof by his Guardian ad Litem, Thomas H. Geyer; the defendant by Patrick J. Fiedler, United States Attorney, by Richard D. Humphrey. The Hon. John C. Shabaz, District Judge, presided.

Upon all of the evidence received, the stipulation entered into between the parties, and the facts as found by the Court which were stated from the bench it is concluded that the plaintiff Robert E. Molzof is presently receiving reasonable, adequate and necessary hospitalization and medical care from the Veterans Administration Hospital, Tomah, Wisconsin, except for physical therapy, the additional availability of a pulmonary function technician (respiratory therapy) and weekly visits from a

physician, for which items adequate monetary compensation will be provided.

No justification has been presented by a preponderance of the evidence for any greater amount of compensation for plaintiff's subsequent medical needs. The reasonable, adequate, and necessary care provided Robert E. Molzof has not been found to be equaled by the alternative private care facilities proposed. Nor have they been found to be readily available. Finally, the speculative nature of the testimony referring to alternative care facilities manifests no present intention whatsoever that were funds available the private care alternatives would be utilized by the plaintiff Robert E. Molzof.

Accordingly, the plaintiff is entitled to future reasonable, necessary and adequate medical care, to include full hospitalization for the remainder of his life, from the defendant United States of America at a Veterans Administration hospital, together with $17,800.00 for physical therapy, $54,700.00 for respiratory therapy, and $5,400.00 for weekly physican's visits; in all, the sum of $67,950.00.

Any amount for medical care in excess of this award would be punitive in nature to the defendant, resulting in double recovery. The defendant would provide the same high degree of medical care and hospitalization in addition to a monetary award for alternate medical care which would not be utilized.

Further, no authority exists for those damages requested for plaintiff's five-year shortened life expectancy.

Finally, an award for lost enjoyment of life is not provided in these circumstances by federal law. The vegetative state of the plaintiff Robert E. Molzof and his complete inability to enjoy the remainder of his life would not be enhanced in any way by such an award which the Court had previously determined to be no more than $60,000.00. His enjoyment of life at the time of the accident had been severely hampered by excruciating pain and debilitating illness. Although such an amount may be appropriately awarded under Wisconsin law, it is determined by the Federal Tort Claims Act to be punitive in nature. Plaintiff Robert E. Molzof's full medical needs have been provided in an attempt to sustain his limited period of life. To provide any sum in addition thereto would be of no benefit whatsoever to the plaintiff Robert E. Molzof, but instead an accumulation for his estate.

There is further awarded to the plaintiff Shirley M. Molzof the amount of $150,000.00 for the loss of society and the companionship of her husband, Robert E. Molzof, the Court having considered her age and health, the love and affection afforded, and the society and companionship extended and rendered, as well as the conduct of the plaintiffs towards each other, and the plaintiff Shirley M. Molzof's loss for the deprivation of that society and companionship.

Accordingly,

ORDER

IT IS ORDERED that judgment be entered in favor of the plaintiff Robert E. Molzoff [sic] against the defendant United States of America in the amount of $67,950.00 plus

costs, and that said defendant provide said plaintiff with reasonable, adequate and necessary medical care, to include hospitalization for the remainder of his life at Veterans Administration facilities.

IT IS FURTHER ORDERED that judgment be entered in favor of the plaintiff Shirley M. Molzof against the defendant United States of America in the amount of $150,000.00 plus costs.

Entered this 12th day of July, 1989.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

JUDGMENT IN A CIVIL CASE

United States District Court	)	DISTRICT Western District of Wisconsin
CASE TITLE Robert E. Molzof, et al., Plaintiffs, V. United States of America, Defendant.	)	DOCKET NUMBER 88-C-904-S
	)	NAME OF JUDGE OR MAGISTRATE John C. Shabaz

[ ] **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial before the Court with the judge named above presiding. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of the plaintiff Robert E. Molzoff [sic] against the defendant Untied [sic] States of America in the amount of $67,950.00 plus costs, and that said defendant provide said plaintiff with reasonable, adequate and necessary medical care, to include hospitalization for the remainder of his life at Veterans Administration facilities.

It Is Further Ordered and Adjudged that judgment is entered in favor of the plaintiff Shirley M. Molzof against the defendant United States of America in the amount of $150,000.00 plus costs.

CLERK

illegible

(BY)DEPUTY CLERK

DATE

July 12, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT E. MOLZOF, by his Guardian ad Litem, Thomas H. Geyer, and SHIRLEY M. MOLZOF,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CORRECTED MEMORANDUM

88-C-904-S

IT IS ORDERED that the memorandum issued on July 12, 1989 in the above entitled case be corrected as follows:

Paragraph 2 on page 2 should be corrected as follows:

> Accordingly, the plaintiff is entitled to future reasonable, necessary and adequate medical care, to include full hospitalization for the remainder of his life, from the defendant United States of America at a Veterans Administration hospital, together with *$7,800.00 for physical therapy ($2,600.00 per year for 3 years); $54,750.00 for respiratory therapy ($18,250.00 per year for 3 years); and $5,400.00 for weekly physician's visits ($1,800.00 per year for 3 years)*; in all the sum of $67,950.00.

Judgment need not be amended.

Entered this 15th day of August, 1989.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

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38 U.S.C. § 610

§ 610. Eligibility for hospital, nursing home, and domiciliary care

(a)(1) The Administrator shall furnish hospital care, and may furnish nursing home care, which the Administrator determines is needed –

(A) to any veteran for a service-connected disability;

(B) to a veteran whose discharge or release from the active military, naval, or air service was for a disability incurred or aggravated in line of duty, for any disability;

(C) to a veteran who is in receipt of, or who, but for a suspension pursuant to section 351 of this title (or both such a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's continuing eligibility for such care is provided for in the judgment or settlement described in such section, for any disability;

(D) to a veteran who has a service-connected disability rated at 50 percent or more, for any disability;

(E) to any other veteran who has a service-connected disability, for any disability;

(F) to a veteran who is a former prisoner of war, for any disability;

(G) to a veteran exposed to a toxic substance or radiation, as provided in subsection (e) of this section;

(H) to a veteran of the Spanish-American War, the Mexican border period, or World War I, for any disability; and

(I) to a veteran for a non-service-connected disability, if the veteran is unable to defray the expenses of necessary care as determined under section 622(a)(1) of this title.

(2)(A) To the extent that resources and facilities are available, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to a veteran for a non-service-connected disability if the veteran has an income level described in section 622(a)(2) of this title.

(B) In the case of a veteran who is not described in paragraph (1) of this subsection or in subparagraph (A) of this paragraph, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to the veteran for a non-service-connected disability –

(i) to the extent that resources and facilities are otherwise available; and

(ii) subject to the provisions of subsection (f) of this section.

(3) In addition to furnishing hospital care and nursing home care described in paragraphs (1) and (2) of this subsection through Veterans' Administration facilities, the Administrator may furnish such hospital care in accordance with section 603 of this title and may furnish such nursing home care as authorized under section 620 of this title.

(b)(1) The Administrator may furnish to a veteran described in paragraph (2) of this subsection such domiciliary care as the Administrator determines is needed for the purpose of the furnishing of medical services to the veteran.

(2) This subsection applies in the case of the following veterans:

(A) Any veteran whose annual income (as determined under section 503 of this title) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 521(d) of this title.

(B) Any veteran who the Administrator determines has no adequate means of support.

(c) While any veteran is receiving hospital care or nursing home care in any Veterans' Administration facility, the Administrator may, within the limits of Veterans' Administration facilities, furnish medical services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the disability for which such veteran is hospitalized, if the veteran is willing, and the Administrator finds such services to be reasonably necessary to protect the health of such veteran. The Administrator may furnish dental services and treatment, and related dental appliances, under this subsection for a non-service-connected dental condition or disability of a veteran only (1) to the extent that the Administrator determines that the dental facilities of the Veterans' Administration to be used to furnish such services, treatment, or appliances are not needed to furnish services, treatment, or appliances for dental conditions or disabilities described in section 612(b) of this title, or (2) if (A) such non-service-connected dental condition or disability is associated with or aggravating a disability for which such veteran is receiving hospital care, or (B) a compelling medical reason or a dental emergency requires furnishing dental services, treatment, or

appliances (excluding the furnishing of such services, treatment, or appliances of a routine nature) to such veteran during the period of hospitalization under this section.

(d) In no case may nursing home care be furnished in a hospital not under the direct jurisdiction of the Administrator except as provided in section 620 of this title.

(e)(1)(A) Subject to paragraphs (2) and (3) of this subsection, a veteran –

(i) who served on active duty in the Republic of Vietnam during the Vietnam era, and

(ii) who the Administrator finds may have been exposed during such service to dioxin or was exposed during such service to a toxic substance found in a herbicide or defoliant used in connection with military purposes during such era, is eligible for hospital care and nursing home care under subsection (a)(1)(G)

of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(B) Subject to paragraphs (2) and (3) of this subsection, a veteran who the Administrator finds was exposed while serving on active duty to ionizing radiation from the detonation of a nuclear device in connection with such veteran's participation in the test of such a device or with the American occupation of Hiroshima and Nagasaki, Japan, during the period beginning on September 11, 1945, and ending on July 1, 1946, is eligible for hospital care and nursing home care under subsection

(a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(2) Hospital and nursing home care may not be provided under subsection (a)(1)(G) of this section with respect to a disability that is found, in accordance with guidelines issued by the Chief Medical Director, to have resulted from a cause other than an exposure described in subparagraph (A) or (B) of paragraph (1) of this subsection.

(3) Hospital and nursing home care and medical services may not be provided under or by virtue of subsection (a)(1)(G) of this section after December 31, 1990.

(f)(1) The Administrator may not furnish hospital care or nursing home care under this section to a veteran who is eligible for such care by reason of subsection (a)(2)(B) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) of this subsection.

(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to the lesser of –

> **(A)** the cost of furnishing such care, as determined by the Administrator; and
>
> **(B)** the amount determined under paragraph (3) of this subsection.

(3)(A) In the case of hospital care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is –

> **(i)** the amount of the inpatient Medicare deductible, plus
>
> **(ii)** one-half of such amount for each 90 days of care (or fraction thereof) after the first 90 days of such care during such 365-day period.

(B) In the case of nursing home care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is the amount of the inpatient Medicare deductible for each 90 days of such care (or fraction thereof) during such 365-day period.

(C)(i) Except as provided in clause (ii) of this subparagraph, in the case of a veteran who is admitted for nursing home care under this section after being furnished, during the preceding 365-day period, hospital care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of hospital care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such nursing home care until –

> **(I)** the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or
>
> **(II)** the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(ii) In the case of a veteran who is admitted for nursing home care under this section after being furnished, during any 365-day period, hospital care for which the veteran has paid an amount under subparagraph (A)(ii) of this paragraph and who has not been furnished 90 days of hospital care in connection with such payment, the amount of the liability of the veteran under paragraph (2) of this subsection with respect to the number of days of such nursing home care which, when added to the number of days of such hospital care, is 90 or less, is the difference between the inpatient Medicare deductible and the amount paid under such subparagraph until –

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(D) In the case of a veteran who is admitted for hospital care under this section after having been furnished, during the preceding 365-day period, nursing home care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of nursing home care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such hospital care until –

(i) the veteran has been furnished, beginning with the first day of such nursing home care furnished in connection with such payment, a total of 90 days of nursing home care and hospital care; or

(ii) the end of the 365-day period applicable to the nursing home care for which payment was made,

whichever occurs first.

(E) A veteran may not be required to make a payment under this subsection for hospital care or nursing home care furnished under this section during any 90-day period in which the veteran is furnished medical services under section 612(f) of this title to the extent that such payment would cause the total amount paid by the veteran under this subsection for hospital care and nursing home care furnished during that period and under section 612(f)(4) of this title for medical services furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such period.

(F) A veteran may not be required to make a payment under this subsection or section 612(f) of this title for any days of care in excess of 360 days of care during any 365-calendar-day period.

(4) Amounts collected or received on behalf of the United States under this subsection shall be deposited in the Treasury as miscellaneous receipts.

(5) For the purposes of this subsection, the term "inpatient Medicare deductible" means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b) on

the first day of the 365-day period applicable under paragraph (3) of this subsection.

(g) Nothing in this section requires the Administrator to furnish care to a veteran to whom another agency of Federal, State, or local government has a duty under law to provide care in an institution of such government.